

ajn

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ROBERTO L. CACERES, JR.,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 02-4124-JAR
)	
BROADWING COMMUNICATION SERVICES, INC.,)	
)	
)	
Defendant.)	
<hr style="width: 40%; margin-left: 0;"/>)	

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT’S MOTION TO DISMISS OR, ALTERNATIVELY,
TO COMPEL DISCOVERY**

This matter comes before the Court on Defendant’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 9(b) or, Alternatively, to Compel Discovery (Doc. 21). Plaintiff filed a Response (Doc. 29) requesting leave to amend his complaint. For the reasons set forth below, the Court grants Defendant’s motion in part and denies it in part.

Fraud claim

Defendant Broadwing Communication Services, Inc., moves for dismissal of the Plaintiff’s fraud claim for lack of particularity or alternatively to compel discovery. Count IV of the Plaintiff’s Complaint alleges that the Defendant fraudulently misled Plaintiff to quit his job in hopes of being hired by the Defendant when the Defendant knew that it would not hire the Plaintiff. Count IV states that:

23. Plaintiff incorporates by reference herein, the allegations set forth in his preceding causes of action.
24. Defendant's conduct as set forth above and the representations to Mr. Caceres turned out to be false.
25. Defendant knew that representations made to Mr. Caceres were false.
26. Defendant's fraudulent misrepresentations were calculated to cause Mr. Caceres to terminate his existing employment relationship.
27. Mr. Caceres reasonably and justifiably relied on Defendant's representations to him.
28. As a result of Defendant's fraudulent conduct, Mr. Caceres sustained egregious economic damages.¹

Defendant argues that Count IV does not satisfy Fed. R. Civ. P. 9(b) and moves the court to dismiss the Complaint as a remedy. Fed. R. Civ. P. 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Allegations of fraud must "set forth the time, place, contents of the false representation, and the identity of the party making the false statements and the consequences thereof."² The purpose of Rule 9(b) is "to afford defendant fair notice of plaintiff's claims and the factual ground upon which [they] are based..."³

Specifically, Defendant argues that Paragraph 24 of the Complaint does not satisfy the requirement of setting forth a specific time, place, and specific contents of the alleged

¹ *Plaintiff's Complaint*, filed 08/05/2002. (Doc. 1)

² *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (citing *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)).

³ *Id.* at 1236-37 (citation omitted).

misrepresentations due to its broad incorporation of the other allegations in the Complaint.⁴ The Court agrees that Count IV fails to mention the place or time at which any misrepresentations were made, and fails to specify the content of the alleged misrepresentations. References such as “Defendant’s conduct as set forth above and the representations to Mr. Caceres turned out to be false” are too vague to satisfy Rule 9(b) and to put the Defendant on notice of what statements are alleged to be misrepresentations. Although the Court finds that Plaintiff’s fraud claims are inadequate, Plaintiff could plead facts that might cure this deficiency in his Complaint.⁵ Therefore, the Court exercises the discretion provided it by Fed. R. Civ. P. 15(a) and grants Plaintiff leave to amend its Complaint to comply with the pleading requirements of Fed. R. Civ. P. 9(b).

_____ ***Discovery***

_____ Alternatively, the Defendant seeks to compel discovery on the fraud allegation pursuant to Local Rules 37.1(b) and 37.2. The Court has granted the Plaintiff leave to amend his Complaint and compelling discovery on the claim is premature at this time. Thus, the Court will deny the motion to compel without prejudice to preserve the Defendant’s right to raise this motion should it become necessary .

IT IS THEREFORE ORDERED BY THE COURT that Defendant’s Motion to Dismiss Count IV of the Complaint (Doc. 21) shall be GRANTED; Plaintiff shall have leave to amend his complaint to cure the deficiency regarding his allegations of fraud within twenty (20) days of the date of this order.

IT IS FURTHER ORDERED that Defendant’s Motion to Compel Discovery (Doc. 21)

⁴ *Reply Memorandum in Support of Defendant’s Motion to Dismiss*, filed 06/04/200. (Doc. 41)

⁵ *See Kindergartners Count, Inc. v. Demoulin*, 171 F. Supp.2d 1183, 1194-95 (D. Kan. 2001).

shall be DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Dated this 24th day of June, 2003.

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE